IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

GRAHAM V. DIETZE

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ROBERT H. GRAHAM, APPELLANT,
V.
PAUL J. DIETZE AND HASTINGS LASER & EYE SURGERY CENTER, L.L.C., APPELLEES.

ROBERT H. GRAHAM, APPELLANT,
V.
PAUL J. DIETZE AND D&G EQUIPMENT AND REAL ESTATE PARTNERSHIP, APPELLEES, AND G.F. GEIGER, INTERVENOR-APPELLEE.

Filed April 20, 2010. Nos. A-08-796, A-09-088.

Appeal from the District Court for Adams County: STEPHEN R. ILLINGWORTH, Judge. Affirmed in part as modified, and in part reversed.

Bradley D. Holbrook and Justin R. Hermann, of Jacobsen, Orr, Nelson, Lindstrom & Holbrook, P.C., L.L.O., for appellant.

Michael P. Burns, of Sullivan, Shoemaker, Witt & Burns, P.C., L.L.O., for appellees.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

Dr. Robert H. Graham appeals from the final orders of the district court for Adams County in two cases which were consolidated for trial and again on appeal. After his expulsion from Geiger, Dietze & Graham Ophthalmology (ophthalmology practice) in which he practiced with Drs. Paul J. Dietze and G.F. Geiger, Graham filed two separate lawsuits, alleging a breach of his contractual rights with respect to two entities related to the ophthalmology practice: Hastings Laser & Eye Surgery Center, L.L.C. (HLESC), and D&G Equipment and Real Estate Partnership (D&G). The district court entered judgment in Graham's favor in both cases. On appeal, Graham alleges that the court used the incorrect time period in setting the value of his capital accounts in HLESC and D&G, overruling his motion to require an audit of HLESC's and D&G's records for that same period, ordering him to pay 50 percent of an expert witness fee, and determining that, upon payment of the judgment in the case relating to D&G, Geiger's interest in that entity would be restored. For the reasons set forth herein, we affirm in part as modified, and in part reverse.

BACKGROUND

Dietze and Gieger had an established ophthalmology practice, Geiger & Dietze Ophthalmology, in Hastings, Nebraska, when they recruited Graham in 1999. In connection with their ophthalmology practice, Dietze and Geiger maintained two other entities: Optical Options, which provided prescription eyeglasses, and Geiger and Dietze Equipment and Real Estate Partnership (equipment and real estate partnership), which rented medical equipment and real estate to the ophthalmology practice. In October 2000, Graham, through his professional corporation, became a partner in the ophthalmology practice.

In August 2000, Dietze and Graham incorporated a fourth entity, HLESC, the purpose of which was to perform eye surgeries. Dietze and Graham each owned 50 percent of HLESC. Although Geiger was not a member of HLESC, he did perform surgeries at the surgery center. In November 2002, Graham purchased Geiger's 50-percent interest in the equipment and real estate partnership, and the partnership name was changed to D&G. In November 2003, Graham was expelled from the ophthalmology practice. At issue in these appeals is the effect of that expulsion on Graham's interest in HLESC and D&G. We set forth further information about these entities below.

HLESC.

HLESC is a limited liability company. The articles of organization and the operating agreement for HLESC were received in evidence. These documents reveal that Graham and Dietze each contributed an equal amount of capital and each held a 50-percent interest in the company. The agreement provided that the company's profits or losses for any fiscal year would be allocated among the members in accordance with their respective cumulative capital contributions, adjusted to reflect any withdrawals of capital by any members. The company was required to maintain full and accurate books of account, which would be open to reasonable inspection and examination by the members or their authorized representatives. Provisions were included regarding the transfer or assignment of a member's interest in the company. The articles provided that the duration of the company was perpetual unless dissolved. The only basis for dissolution of the company set forth in the operating agreement was the written agreement of all members.

D&G.

The original equipment and real estate partnership agreement was entered into by Geiger and Dietze on March 13, 1995. The partnership was to continue for a period of 25 years, unless terminated sooner in accordance with the agreement. The agreement provided that Geiger and Dietze were to contribute an equal amount of capital and were to share in the profits and losses of the partnership on a 50-50 basis. Management of the partnership was to be by a majority of all partners. The agreement provided for the maintenance of complete and accurate financial records, access to those records by the partners, and the provision of annual statements to the partners showing partnership profits and losses. The agreement provided for dissolution of the partnership upon a majority vote of all partners or pursuant to Nebraska law.

On November 1, 2002, Graham purchased Geiger's 50-percent interest in the equipment and real estate partnership for the sum of $201,000, which was amortized over a 3-year period at 6-percent interest for a total cost of $220,131.14. According to the amortization schedule in the record, Graham was to make 36 monthly payments to Geiger of $6,114.81 beginning November 1. In connection with this purchase, Geiger and Graham executed an assignment of Geiger's 50-percent interest in the partnership to Graham. As a part of this assignment, Geiger acknowledged that he had no further interest in the partnership or the property of the partnership. Geiger was paid in full for the balance of his capital account in the partnership as of November 1, 2002.

Also on November 1, 2002, Geiger, Graham, and Dietze executed an amendment to the original partnership agreement. The amendment provided for Geiger's withdrawal as a partner and Graham's admission as a new partner effective November 1. The amendment shows that Graham and Dietze then each held a 50-percent interest in the equipment and real estate partnership, which was renamed D&G. The amendment provided that, except for the changes set forth in the amendment document, all other provisions of the original partnership agreement were to remain in full force and effect.

The record shows that D&G had a monthly rental income of $8,000 from the ophthalmology practice and average monthly expenses of $1,074.91. The surplus of rent exceeding expenses was paid to the partners on a regular basis.

Expulsion From Ophthalmology Practice.

On November 17, 2003, Graham received a notice of expulsion, the intent of which was to expel his professional corporation from the ophthalmology practice. Graham did not receive any formal notices for the termination of his 50-percent interests in HLESC and D&G, nor has there been a dissolution of either entity. After Graham received the notice of expulsion from the ophthalmology practice, he no longer received financial information for either entity based upon Dietze's instruction to the entities' accountant and bookkeeper. Also at Dietze's direction, savings accounts were opened for HLESC and D&G in which the entities appeared to retain net profits throughout the year until distribution. After January 2004, Graham received no income distribution from either entity. Graham performed no surgeries at HLESC after the early part of January 2004, as he received a letter dated January 19, 2004, stating he would not be allowed to perform surgeries. Graham discontinued payments to Geiger on his purchase of Geiger's interest in D&G in February 2004 as he was not receiving any payments from any of the entities. Graham paid $91,722.15 toward the full purchase price of $220,133.84 of Geiger's 50-percent interest.

Litigation.

Graham filed complaints in the district court in both cases on October 20, 2004. In the HLESC case, Graham filed suit against Dietze and HLESC. Graham alleged that Dietze was unilaterally controlling disbursements from HLESC without authority to do so and that Dietze's unilateral actions in freezing and controlling the financial accounts of HLESC constituted a material breach of the HLESC operating agreement. Graham further alleged that he had been prevented from accessing financial accounts and records for HLESC in direct contravention of the operating agreement. Graham sought a temporary injunction requiring that all distributions payable to him be made and that he be provided statements of the bank accounts of HLESC; an accounting of HLESC's assets, income, and expenditures; and judgment for all sums due to him. In the D&G case, Graham filed suit against Dietze and D&G. Graham made similar allegations in that case about Dietze's breach of the partnership agreement. In the D&G case, Graham asked the court to order the monthly disbursements due from D&G to him for the months of February through October 2004, that the court order an accounting of all income and disbursements from D&G, and that Graham be awarded judgment for all sums found to be due.

On June 24, 2005, Dietze and HLESC and Dietze and D&G filed answers in the respective cases against them, generally denying the allegations of Graham's complaints.

On August 11, 2005, the district court granted Geiger's request to intervene in the D&G case. On August 23, Geiger filed an answer and cross-claim, seeking payment from Graham of the remaining purchase price of Geiger's interest in the equipment and real estate partnership. Geiger alleged that he had received a total of $91,722.15 from Graham toward the total purchase price of $220,133.14. In his answer to Geiger's cross-claim, Graham affirmatively alleged that he and Geiger agreed that payment was contingent upon Graham's receiving monthly distributions of at least $4,000 from D&G. Graham agreed that Geiger had received a total of $91,722.15 but denied that the total purchase price was $220,133.14. Graham affirmatively alleged that because he did not receive monthly distributions from D&G after January 2004, no further amounts were due after his payment in March 2004 and Geiger was not entitled to demand payment on past-due amounts.

The cases were consolidated for trial, which was held before the district court on October 2 and 3, 2006. The court heard testimony from various witnesses and received various documentary exhibits, and the evidence received at trial is generally reflected in the background section above. We have collectively referred to the defendants in both cases and the intervenor in the D&G case as "the Appellees" throughout this opinion.

The district court entered an order on March 21, 2007. After making certain findings of fact, the court found there had not been sufficient accounting through the discovery process to allow it to enter appropriate judgments. The court noted that Graham had at no time received a notice that his interests in D&G and HLESC had been terminated or that either entity no longer existed. Pursuant to its power to appoint experts under Neb. Rev. Stat. § 27-706 (Reissue 2008), the court found it appropriate to appoint a certified public accountant with no allegiance to either side in order to provide an accounting. The court ordered Graham and the Appellees to each pay 50-percent of the expert's fee. In a subsequent order, the court granted Graham's motion to restrict distributions and ordered the Appellees to cease any and all distributions from HLESC and D&G pending the accounting ordered by the court.

On June 28, 2007, the district court entered an order appointing Chris Oppliger, the expert suggested for appointment by Graham, as the court-appointed expert. The district court ordered that Oppliger provide an accounting on HLESC and D&G from December 1, 2003, through December 31, 2006, and to provide a valuation of Graham's interest in both entities for that period. The court ordered the parties and counsel to cooperate and provide any information Oppliger needed to perform his duties.

On September 7, 2007, Graham filed a motion, seeking an order from the district court directing Oppliger to perform "an audit" of HLESC and D&G books and records for the period from December 31, 2003, through December 31, 2006. The court overruled Graham's motion.

Oppliger's Report.

A hearing was held before the district court on March 28, 2008, and the court received Oppliger's report into evidence over Graham's "ongoing objection" that the report was "not what was requested in terms of having a full accounting of the company's books." Oppliger's report is dated August 15, 2007, and is an accounting and valuation of Graham's interest in HLESC and D&G for the period December 1, 2003, to December 31, 2006. The report contains Oppliger's findings with respect to the operations of HLESC and D&G and the status of the partners'/members' equities as reflected on the books and records as of December 31, 2006.

Oppliger reviewed the history of Graham's involvement in D&G, noting that after Graham's last payment to Geiger in February 2004, the D&G books were adjusted, "re-admitting" Geiger as a partner. Beginning in early 2004 and continuing through 2006, the income of D&G was allocated 50 percent to Geiger and 50 percent to Diezte. Oppliger contacted the parties' attorneys to inquire about Geiger's "readmission" to the D&G partnership and was informed by all parties that there had been no new written partnership agreement. In light of this information, Oppliger opined that the adjustment "re-admitting" Geiger to the partnership should not have been made and the capital accounts should be as reflected in exhibit A(7) attached to his report. This exhibit reflects the D&G "equity accounts" of Geiger, Dietze, and Graham, with no change in ownership and no adjustment of the I.R.C. § 743(b) deduction. The capital account of Graham as of December 31, 2006, should have been $155,062.89.

Oppliger also outlined the history of HLESC. Oppliger observed that for the year ending December 31, 2003, the net income of HLESC was divided equally between Graham and Dietze. Oppliger further observed that in 2004, HLSEC's net income was allocated 1/24 to Graham and 23/24 to Dietze. Oppliger found no explanation as to why the allocation was made on this basis. As with his investigation of the D&G accounts, Oppliger contacted the parties' attorneys regarding any new operating agreement for HLESC, who confirmed that there was no written agreement transferring Graham's interest in HLESC back to Dietze. As summarized, Oppliger's report stated that, with no change in ownership, the net income should have been divided equally between Dietze and Graham for 2004, 2005, and 2006. He further calculated the respective capital accounts, which reflected the withdrawals made by Dietze in 2005 and 2006, which created a deficit balance in Dietze's account. With no change in ownership of HLESC, the capital accounts as of December 31, 2006, should have reflected a sum of $244,721.91 for Graham and a negative figure of $157,603.69 for Dietze.

Judgments and Appeals.

On July 2, 2008, the district court entered judgment in Graham's favor against Dietze, HLESC, and D&G. The court noted that Graham was not involved with either HLESC or D&G after January 2004, and found that "the most equitable time" to set the value of Graham's capital accounts was December 31, 2003, "when reliable financial information was available." The court noted Graham's argument that he should receive money for income generated up through 2006 although he provided no work or benefit to the operation of either entity after January 2004 and the Appellees' argument that Graham should receive about $30,000 total for his interest in the two entities despite the fact that he invested $91,727.15 in D&G. The court stated, "Both positions are extreme and not equitable." The court entered judgment in the HLESC case for $9,631.53 and in the D&G case for $124,729.90, based upon calculations contained in Oppliger's report. The court made no findings with respect to the cross-claim filed by Geiger.

Graham filed appeals to this court in both cases from the district court's July 2, 2008, order, but this court, on September 10, dismissed the appeal in the D&G case for lack of a final order. (See case No. A-08-797.) On November 13, 2008, Dietze, D&G, and Geiger sought an order from the district court ruling on Geiger's cross-claim. In an order entered on January 12, 2009, the court determined that its previous judgment of $124,729.90 in Graham's favor entered in the D&G case was the joint and several responsibility of Geiger and the other Appellees in that case. The court stated that upon payment of that judgment, Graham no longer had any further ownership interest in D&G and that Geiger's 50-percent interest in that partnership was thereby restored. Graham subsequently perfected his appeal in the D&G case, and we have consolidated the appeals in both cases for consideration in this court.

ASSIGNMENTS OF ERROR

Graham asserts that the district court erred in (1) determining that December 31, 2003, was the appropriate time to set the value of Graham's capital accounts and therefore entering judgment for only $9,631.53 in the HLESC case and only $124,729.90 in the D&G case; (2) denying Graham's motion to require an audit of HLESC's and D&G's records from December 31, 2003, through December 31, 2006; (3) ordering Graham to pay 50 percent of Oppliger's fee; and (4) determining that, upon payment of the judgment in the D&G case, Geiger's 50-percent interest would be restored.

STANDARD OF REVIEW

The parties disagree over the correct standard of appellate review for these consolidated cases.

Graham argues that these cases involve a request for an accounting and a distribution of profits pursuant to the accounting. In other words, Graham argues that these are equitable actions and that the standard of review is de novo. An action for a partnership dissolution and accounting between partners is one in equity and is reviewed de novo on the record. *Shoemaker v. Shoemaker*, 275 Neb. 112, 745 N.W.2d 299 (2008). On appeal from an equity action, an appellate court resolves questions of law and fact independently of the trial court's determinations. *Id.* In an equity action, when credible evidence is in conflict on material issues of fact, an appellate court considers and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another. *Id.* The interpretation of a partnership agreement presents a question of law. *Id.*

The Appellees, on the other hand, argue that these cases are actions at law involving contract disputes. A suit for damages arising from breach of a contract presents an action at law. *Albert v. Heritage Admin. Servs.*, 277 Neb. 404, 763 N.W.2d 373 (2009). In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Id.* The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *Id.*

The nature of an action, whether legal or equitable, is determinable from its main object, as disclosed by the averments of the pleadings and the relief sought. *ADT Security Servs. v. A/C Security Systems*, 15 Neb. App. 666, 736 N.W.2d 737 (2007).

Upon reviewing the pleadings and the relief sought, we conclude that these are breach of contract actions and thus reviewable as actions at law. Graham clearly alleges breaches of both the HLESC operating agreement and the D&G partnership agreement. Although he did seek an accounting of both entities, under the circumstances of these cases, an accounting was the most logical method to determine Graham's remedy in the event the district court found that either of the respective contracts had been breached. In reaching the conclusion that these appeals are reviewable as actions at law, we also note that none of the parties asserted a cause of action for dissolution of either entity.

ANALYSIS

Valuation Date.

Graham asserts that the district court erred in determining that December 31, 2003, was the appropriate time to set the value of Graham's capital accounts and therefore entering judgment for only $9,631.53 in the HLESC case and only $124,729.90 in the D&G case. The district court found that although Graham's 50-percent interests in HLESC and D&G had not been terminated, he was not involved in either entity after January 2004. Accordingly, the court found that December 31, 2003, was the "most equitable" time to set the value of Graham's capital accounts. We conclude that the district court's attempt to apply equitable principles in this action was contrary to the clear language of the HLESC articles of organization and operating agreement, the D&G partnership agreement as amended, and the document transferring Geiger's interest in D&G to Graham. When the terms of a contract are clear, they are to be accorded their plain and ordinary meaning. *Pavers, Inc. v. Board of Regents*, 276 Neb. 559, 755 N.W.2d 400 (2008).

In setting the valuation date of Graham's interest in the two entities as December 31, 2003, and in restoring Geiger's interest in D&G upon payment of the judgment to Graham, the district court essentially found that the actions of the parties amounted to a dissolution or a termination of Graham's interest in the entities. There are several problems with this resolution. First, no action was taken consistent with the agreements to dissolve either entity, or transfer or assign Graham's interest in either entity. With regard to HLESC, there was no written agreement between Graham and Dietze to dissolve the company, nor did Graham transfer or assign his interest to Dietze. With regard to D&G, the partnership period of 25 years had not expired, and the partnership had not been dissolved upon a majority vote of all partners or pursuant to Nebraska law. The agreements of the two entities do not provide for expulsion of a partner or member or for involuntary termination or transfer of a partner's or member's interest. Second, none of the parties sought judicial dissolution of the entity or judicial expulsion of Graham. See Neb. Rev. Stat. §§ 21-2622 (Reissue 2007) (providing for judicial dissolution of limited liability company) and 67-431 and 67-439 (Reissue 2009) (providing for judicial expulsion of partner from partnership and dissolution of partnership).

The contracts at issue provide that Graham has a 50-percent interest in the two entities and that the profits and losses of the two entities would be distributed based on that ownership interest. The question presented in this appeal is whether Graham continued to be entitled to profits after he was effectively excluded from involvement in the entities but retained his interest in them. Based upon our independent review of the pertinent agreements, we conclude that the question must be answered in the affirmative.

There was no requirement in any of the relevant contracts that Graham's personal corporation be a partner in the ophthalmology practice in order for Graham himself to share in the profits and/or losses of HLESC and D&G. The HLESC agreement does not require Graham to perform surgeries at the surgery center in order to share in any distributions from HLESC. Further, section 1.3 of the HLESC operating agreement provides that members are not expected to devote full time and attention to the affairs of the company, but only that time and attention that is "reasonable and appropriate in the member's good faith judgment under the prevailing circumstances." Because Graham was prevented from performing surgeries at the surgery center and not provided financial information concerning HLESC after January 2004, he was unable to devote any time and attention to HLESC. With regard to D&G, there is nothing in the amended partnership agreement requiring that the partners actively participate in the day-to-day affairs of the partnership in order to share in the profits.

With respect to the operation of limited liability companies, we note Neb. Rev. Stat. § 21-2618 (Reissue 2007) which provides:

> A limited liability company may divide the profits of its business and distribute the profits to the members of the limited liability company upon the basis stipulated in the operating agreement if, after distribution is made, the aggregate fair market value of the assets of the limited liability company is in excess of all liabilities of the limited liability company other than liabilities to members on account of their contributions to capital.

And, with respect to partnerships, we note Neb. Rev. Stat. § 67-404(1) (Reissue 2009), which provides:

> Except as otherwise provided in subsection (2) of this section, relations among the partners and between the partners and the partnership are governed by the partnership agreement. To the extent the partnership agreement does not otherwise provide, the Uniform Partnership Act of 1998 governs relations among the partners and between the partners and the partnership.

Because Graham's interest in the entities had not been terminated nor had the entities been dissolved, we conclude that the court erred in using December 31, 2003, as the date on which to value Graham's capital accounts in HLESC and D&G.

However, rather than entering judgment for the value of the capital accounts, the court should have determined the amount of net income or profit from the entities that Graham was entitled to through December 31, 2006. The entities had not been dissolved as of December 31, 2006, and therefore, a final accounting and division of the capital accounts was premature. Rather, the issue is the amount of profits that Graham was entitled to for 2004 through 2006.

Based upon Oppliger's report, the allocation of income from the entities was done correctly through December 31, 2003. In 2004, both entities allocated only 1/24 of the net income to Graham as opposed to 50 percent. In 2005 and 2006, Graham was not allocated any net income from the entities. Based upon the information contained in Oppliger's report, we summarize the net income that should have been allocated to Graham as follows:

<u>HLESC</u>

2004 Total Net Income	=	$157,595.75
Graham's 50 percent	=	78,797.87
Less 2004 distribution	–	6,566.49 (1/24)
Amount due Graham	=	72,231.38
2005 Total Net Income	=	$208,700.64
Graham's 50 percent	=	104,350.32
2006 Total Net Income	=	$113,017.35
Graham's 50 percent	=	56,508.67

(Oppliger's report incorrectly computed as $58,508.67)

Total Net Income to be allocated to Graham from HLSEC from January 1, 2004, through December 31, 2006, = $239,656.86.

<u>D&G</u>

2004 Total Net Income	=	$ 86,931.54
Graham's 50 percent	=	43,465.77
Less 2004 distribution	–	3,622.00 (1/24)
Amount due Graham	=	39,843.77
2005 Total Net Income	=	$ 87,012.48
Graham's 50 percent	=	43,506.24
2006 Total Net Income	=	$100,194.92
Graham's 50 percent	=	50,097.46

Total Net Income to be allocated to Graham from D&G from January 1, 2004, through December 31, 2006, = $133,447.47.

Accordingly, we find that Graham is entitled to judgment from HLESC and Dietze in the total sum of $239,656.86 and from D&G, Dietze, and Geiger in the total sum of $133,447.47, and we modify the district court's judgment accordingly.

We do not determine the rights and liabilities of the parties after December 31, 2006, as we do not have evidence of the parties' actions since that time.

Motion to Require Audit.

Graham asserts that the district court erred in denying his motion to require an audit of HLESC's and D&G's records from December 31, 2003, through December 31, 2006. The court denied Graham's motion based on the entry of its previous orders requiring the Appellees to account for all financial activity of the two entities for the relevant period. On appeal, Graham questions the reliability of Oppliger's report because it was entirely dependent upon financial records prepared by the certified public accountant and bookkeeper for the various entities, who were under Dietze's control and direction. Graham argues that Oppliger's report is problematic in that Oppliger did not inspect all of HLESC's and D&G's daily deposits, check registers, and copies of account statements; Dietze's professional and personal income tax returns; and other documentation. Given the court's order requiring the Appellees to account for all financial activity of HLESC and D&G during the relevant period, its appointment of an independent certified public accountant, Graham's ability to review the records upon their disclosure to Oppliger, and our examination of Oppliger's report, we find no error in the court's denial of Graham's subsequent motion to perform an audit of HLESC's and D&G's books and records.

Payment of Expert's Fee.

Graham asserts that the district court erred in ordering him to pay 50 percent of Oppliger's fee. Graham argues that since the court-ordered accounting was only necessary because of Dietze's wrongful conduct in breaching the relevant agreements and unilateral directions given to the entities' bookkeeper and certified public accountant, it was inappropriate and inequitable to require Graham to pay half of the fee. The court ordered that an expert be appointed according to its authority under § 27-706, which provides that expert witnesses appointed under that section are entitled to "reasonable compensation . . . which may be provided . . . by the opposing parties in equal portions." We find no error in the court's decision to require Graham to pay half of Oppliger's fee.

Restoration of Geiger's Interest in D&G.

Graham asserts that the district court erred in determining that, upon payment of the judgment in the D&G case, Geiger's 50-percent interest would be restored. In his cross-claim, Geiger sought either the balance due from Graham on the purchase price of Geiger's interest in the real estate partnership or that Graham return any claimed interest in D&G. The assignment document provided that Geiger had assigned his interest in the real estate partnership for consideration of $201,000. In that document, Geiger confirmed that he had received all amounts to which he was entitled as a general partner of the equipment and real estate partnership and that he had no further interest in the partnership or its property after his execution and delivery of the assignment. The assignment document did not provide that the assignment of Geiger's full 50-percent interest was contingent upon Graham's completion of the payments set forth in the amortization schedule. Further, there is nothing in the partnership agreement as amended to suggest that a former partner could be readmitted to the partnership absent further amendment of the agreement. There is no evidence that Geiger was given a security interest in D&G to ensure payment of the purchase price. In short, the district court erred in restoring Geiger's interest in the partnership. Nonetheless, we cannot ignore the fact that Graham only paid $91,722.15 toward the full purchase price of $220,133.84 (as reflected in the amortization schedule).

The Appellees argue that given the absence of an agreement between the parties addressing the possibility of default on the purchase of Geiger's interest, the doctrine of unjust enrichment should be recognized and applied to address the valuation and damages in the D&G case. They further assert that the district court, by utilizing direct information from Oppliger's report, arrived at a judgment that equitably returned Graham's investment while still sufficiently returning the interest Geiger had maintained in D&G following Graham's default.

The doctrine of unjust enrichment is recognized only in the absence of an agreement between the parties. *Washa v. Miller*, 249 Neb. 941, 546 N.W.2d 813 (1996). As we have previously discussed, application of equitable principles, including unjust enrichment, is not appropriate in this case due to the existence of agreements between the parties. Although the assignment document between Geiger and Graham did not include a provision concerning breach of the agreement, it is clear that Geiger had a common-law remedy for breach of contract, which in fact he utilized in bringing his cross-claim.

We conclude that the district court erred in ordering the restoration of Geiger's 50-percent interest in D&G upon payment of the judgment to Graham. However, we find that Geiger is entitled to the remaining sum of $128,411.69 due under the assignment agreement, together with interest thereon until paid at the judgment rate in effect on July 2, 2008.

CONCLUSION

The district court erred in using December 31, 2006, instead of December 31, 2003, as the date on which to value Graham's capital accounts. We modify the court's entry of a judgment based upon the value of the capital accounts and award judgments in favor of Graham for his 50-percent share of the net income of the entities for 2004 through 2006. Specifically, we enter a judgment in the sum of $239,656.86 against HLESC and Dietze and a judgment in the sum of $133,447.47 against D&G, Dietze, and Geiger.

The district court erred in restoring Geiger's 50-percent interest in D&G upon payment of the judgment to Graham, and we reverse that portion of the judgment. We modify the judgment, however, to find that Geiger is entitled to the remaining sum of $128,411.69 due from Graham under the assignment agreement, and we enter judgment in favor of Geiger on his cross-claim in the sum of $128,411.69.

The district court did not err in denying Graham's motion to perform an audit of HLESC's and D&G's books and records or in requiring Graham to pay half of Oppliger's fee.

AFFIRMED IN PART AS MODIFIED,
AND IN PART REVERSED.